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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1073

FIRST NATIONAL BANK OF OREGON,
a national banking association,

Petitioner,

v.

AMERICAN TIMBER & TRADING CO., an Oregon corporation, LAWRENCE BERNARD, individually and DR. LAWRENCE BERNARD, Professional Corporation, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fredric A. Yerke
Norman J. Wiener
MILLER, ANDERSON, NASH,
YERKE & WIENER
900 S. W. Fifth Avenue
Portland, Oregon 97204

Counsel for Petitioner

February 25, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, First National Bank of Oregon (Bank), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on

November 20, 1973, which affirmed an order granting partial summary judgment in favor of respondents.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported at 334 F Supp 888 and is appended hereto at pages 1a-4a of the Appendix.

The opinion of the Court of Appeals, affirming the order of the United States District Court, has not yet been reported. It is appended hereto at pages 6a-14a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1973. A timely petition for rehearing was filed on December 4, 1973. An order granting the petition for rehearing was filed April 10, 1974 (Appendix p. 15a). An order denying

the petition for rehearing was filed December 2, 1974, and docketed December 4, 1974 (Appendix pp. 16a-17a).

Jurisdiction of this court is invoked under 28 USC, § 1254(1), by petition filed within the time provided by 28 USC, § 2101(c).

QUESTIONS PRESENTED

1. Under the National Bank Act (12 USC, § 86), which provides a penalty for "knowingly" contracting for and taking excessive interest, does the statute require specific intent to violate the law, or only a general intent to do an act?

2. May summary judgment be granted where there are disputed issues of material fact?

3. Is an action under 12 USC, § 86, controlled by state law or federal law?

4. May an action for usury be maintained under federal law where state legislation, enacted subsequent to the contract,

abolishes maximum legal interest rates and the defense of usury in the classes of transactions involved?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the Appendix beginning at page 18a. They include the following:

1. 12 USC, § 85.
2. 12 USC, § 86.
3. ORS 82.010 (Vol. 1, p. 715).
4. ORS 708.480 (Vol. 5, pp. 604-605).
5. Rule 56, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Nature of Action

This is an action under 12 USC, § 86, against a national bank to recover a penalty of twice the interest paid for allegedly charging and receiving usurious interest. Respondents contended that the federal courts have jurisdiction under

28 USC, § 1355; 28 USC, § 1331; or 28 USC, § 1337.

Respondents alleged in their complaints that Bank violated 12 USC, § 86, in computing interest contracted for at the maximum statutory rate on the basis of a 360-day year (a method commonly used by banks and usually referred to as "ordinary interest") instead of computing such interest on the basis of a 365-day year.

B. Proceedings leading to Motions for Summary Judgment

Respondent American Timber & Trading Co. (AT&T) filed its complaint under 12 USC, § 86, and moved to be allowed to maintain this case as a "class action" under Rule 23, Federal Rules of Civil Procedure.

Thereafter, AT&T's attorneys filed a complaint in intervention on behalf of Respondents Lawrence Bernard and Dr. Lawrence Bernard, P.C. (Bernard).

The trial court ordered that the case proceed as a class action, but that notices not be sent to members of the purported class.

The trial court's order that no notices be sent was connected with a proposal that the parties segregate for advance determination the issue whether it would be usurious under 12 USC, § 86, to compute interest contracted for at the maximum statutory rate on a 360-day basis. The court indicated that it considered the issue a novel one, and that the decision should be subject to immediate appellate review. Accordingly, Bank filed a motion for summary judgment, and AT&T and Bernard filed their cross-motion for partial summary judgment.

C. Decision of the Trial Court

The trial court ruled in favor of respondents on the segregated issue presented

by the cross-motion for summary judgment. Findings of fact, conclusions of law and judgment were thereupon entered. In such judgment, the trial court certified the matter for interlocutory appeal under the provisions of 28 USC, § 1292(b).

D. The Facts

Certain matters were agreed upon by the parties. Other factual matters were in dispute.

The principal stipulated facts were:

AT&T is an Oregon corporation. Lawrence Bernard is a citizen of Oregon and Dr. Lawrence Bernard, P.C., is a professional corporation. Bank is a national banking association with its principal office located in Portland, Oregon.

At the time the commercial loan agreements with Respondents were entered into, the maximum interest rates which could be contracted for under Oregon statutes were 12 percent per annum for loans to corporations

and 10 percent per annum for loans to individuals (except for the Oregon bank and trust companies statutes and small loan statutes, which permitted the charging of higher rates on small loans).

As a general practice, interest is computed by Bank on commercial loans on the basis of a 360-day year, actual days.

November 13, 1968, AT&T and Bank entered into a commercial loan and security agreement. The agreement was amended as of January 29, 1970, increasing the interest rate effective February 1, 1970, to 12 percent "per annum."

On November 18, 1965, Bernard entered into a commercial loan and security agreement with Bank. Bernard incorporated as a professional corporation in 1970, and a commercial loan agreement was entered into between the professional corporation and Bank as of May 1, 1970. Bernard's loan agreement with Bank as an individual

provided for interest at the rate of 10 percent per annum. The loan agreement entered into by Bernard as a professional corporation provided for interest at the rate of 12 percent per annum.

Other facts which Bank contended were supported by the record were set forth in the "Agreed Facts and Contentions" as follows:

Prior to entering into the loan agreements with AT&T and Bernard, Bank's normal and usual practice was to compute interest on a commercial loan by the use of a method wherein the numerator was actual days and the denominator was 360. In the computation of interest by such method, published charts were used which were prepared on the basis that a year has 360 days. The daily rate so arrived at was then multiplied by the actual number of days during which the loan was outstanding and by the interest rate to arrive at the amount of

interest to be paid by the borrower (Bank's answers to interrogatories Nos. 15, 17, 18 and 24; page 12, deposition of Ralph Voss).

The method of computing interest used by Bank has been followed by many banks and other lending institutions in the United States for over 100 years. Such method of computation is commonly referred to by lending institutions, textwriters and others as "ordinary interest." The method of computing interest on a 365/365 basis is referred to by textwriters as "exact interest" (Bank's answers to interrogatories No. 32; page 58, deposition of Ralph Voss; pages 9-10, deposition of John F. Harrigan).

Other facts appearing in the record, and referred to in the briefs, were:

In computing the interest to be charged on the loans to AT&T and Bernard, Bank computed interest on a 365/360 day basis. Bank believed that the method used was proper, in light of the historical

custom and practice. Bank periodically furnished AT&T and Bernard a statement showing the amount of interest so computed (Bank's answers to interrogatories; Rec. 470).

As of January 30, 1970, wholly exclusive of interest, the principal sum due on loans under AT&T's loan agreement was $707,623.91. In February, 1970, because of defaults on the part of AT&T, Bank demanded immediate possession of the property pledged as security for the loan and has since been in the process of liquidating the property.

After February 1, 1970, AT&T did not make any payment to Bank as interest, nor did it direct that sums collected by AT&T or Bank be applied against interest.

AT&T is now insolvent, and there is still more than $200,000 owed to Bank, exclusive of interest (Robert S. Ludlum affidavit; Rec. 54).

On June 7, 1971, Representative Wright Patman, in a speech to the United States House of Representatives, announced that he had conducted a study of the use by national banks of a 360-day method of computing interest, and that a summary of the results showed:

a. 63 percent of the banks surveyed responded to the questionnaire;

b. 82 percent of those answering calculate some loan interest rates on a 360-day basis;

c. 90 percent have followed the practice for more than 10 years, or have always followed the practice (Rec. 654).

E. The Order for Partial Summary Judgment

The trial court on December 6, 1971, filed its opinion on the "segregated question whether the rates of interest charged certain borrowers by the defendant bank are

usurious under 12 USC, § 86." The trial court stated that no Oregon decision construing the words "per annum" had been found, and that the court did not know how the state court would interpret the words "per annum" if called upon to do so. The court concluded that, because the method of computation would produce a slightly greater return than would be produced by applying the rate of interest to a calendar year of 365 days, the computation would violate the Oregon statute.

On the major issue of requisite degree of intent or scienter, the trial court held that the word "knowingly," as used in 12 USC, § 86, means only that the person intended to do the act, and not that he was required to have the specific intent to violate that statute.

An additional principal issue presented to the trial court was the question whether there had been a custom and practice of

computing interest by use of the 360-day method. The disputed issues of fact centered around that issue. The trial court stated that it was "doubtful" that long usage could be established because only in periods of heavy borrowing and high interest would the question ever arise.

The trial court certified its decision to the Court of Appeals for interlocutory appeal under 28 USC, § 1292(b). Pending decision of the appeal, the trial court stayed further class action proceedings under Rule 23, Federal Rules of Civil Procedure.

F. The Decision of the Court of Appeals

The Court of Appeals affirmed the partial summary judgment order, ruling that the question of computation of interest was a matter of "state law" and that the Court of Appeals would defer to the trial court for a determination of state law; that it was sufficient to constitute a "knowing"

violation of the federal statute to show that, although Bank may not have known that its method of computation was illegal, it knew that computation of interest by the 360-day method would result in a borrower paying more in one year than on the 365-day basis; and left standing the trial court's factual finding that it was doubtful whether the practice could obtain the status of a custom, because only in periods of high interest and heavy borrowing would the question ever arise.

Chief Judge Chambers concurred, but went on to say that what Bank was doing was not "venal" and that he thought the situation cried out for an amendment to the federal statutes to permit what was done here (i.e., computation of interest by the 365/360 method).

Petition for rehearing was filed. The Court of Appeals granted the petition, holding any further action in abeyance for six months to allow the state court to act.

(Appendix p. 15a) Subsequently, it entered another order denying Bank's petition for rehearing (App. p. 16a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals presents a national question involving historical procedures for computing interest by all national banks, and is in direct contravention of the decisions of this court under the National Bank Act. It is also in conflict with decisions in other circuits.

Procedurally, the Court of Appeals has approved summary judgment when the central issue in the case is a factual one, and the probative facts are in dispute. The Court of Appeals erroneously has allowed the trial court to avoid the rules governing summary judgments by approving the trial court's ruling that Bank would be unable to make a factual showing or that the trial court would not be convinced by Bank's evidence.

The decision in this case is of national significance, as it affects a banking practice that has been well known and followed for over 100 years by the banks in both this country and Europe.

A. The Court of Appeals Decision as to Requisite "Intent" is in Conflict with the Decisions, State and Federal, that have been made under 12 USC, § 86.

The statute under which this action is brought (12 USC, § 86) requires that the contracting for and taking of excessive interest must be "knowingly" done, in order to constitute usury and entitle a plaintiff to recover the penalty.

The trial court ruled that it need not be shown that a lender knew that it was violating the statute. Instead, it stated that it would be sufficient to show that a lender knew that it was using the 360-day method of computation. The Court of Appeals adopted the same theory.

The reasoning of the lower courts completely reads out of the statute any requirement of scienter. The lower court decisions in the instant case are contrary to the decisions which have heretofore been made on the subject.

As the federal courts do not have exclusive jurisdiction of an action brought under 12 USC, § 86, a number of the applicable decisions are from state courts. Before examining those decisions, it should be noted that the sole decision relied upon by the courts below in interpreting the word "knowingly" is United States v. International Minerals and Chemical Corporation, 402 US 558 (1971). However, International Minerals did not involve a claim under the usury statute. To the contrary, the sole issue in that case was a statute relating to the transportation of corrosive liquids.

Reliance on International Minerals to interpret a wholly different statute is

inappropriate. Interpretation of the word "knowingly" in one context cannot be carried over in interpreting another statute. The word "knowingly" has a variety of meanings, depending upon context. It is an "accordion" word, and its meaning varies, so that in certain circumstances no scienter need be shown, whereas, in the context of penal statutes, there must be strict proof of knowledge that the act would constitute a violation of the law. State v. Contreras, 253 A2d 612, 620 (RI 1969).

"Knowingly" in a punitive statute implies not only a knowledge of a forbidden act, but also a determination with a bad intent to do it. Felton v. United States, 96 US 699 (1878).

12 USC, § 86, is a punitive statute, and a strong one. The statute provides not merely for the recovery of the alleged excessive interest, but also for double the entire interest. In the context of a

punitive (not compensatory) statute, the word "knowingly" requires a higher degree of culpability--it must mean a wrongful intent. Such is the state law in Oregon. Investment Assoc. v. Stanley, 38 Or 319, 342, 63 P 489 (1901).

> "But, notwithstandng the contract appears to be usurious on its face, and the natural inference to be drawn therefrom is that the parties intended the result of their own acts, yet there is another element which must attend the practice of usury. It must be with a corrupt intent, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law: 27 Am & Eng. Enc. Law (1 ed.), 925; Balfour v. Davis, 14 Or 47 (12 Pac. 89); Burwell v. Burgwyn, 100 N. C. 389 (6 S. E. 409). But, where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken, it has been held that the penalties of usury would not be enforced: * * *." (emphasis added)

The very points raised here were recently made by Judge Gasch in Cohen v. District of Columbia National Bank (D. Columbia No. 2110-69, opinion as yet unpublished, dated July 17, 1974, Appendix

hereto at pp. 29a-42a). Judge Gasch stated that the focal phrase in the statute is "when knowingly done." He reviewed this court's decision in Wheeler v. National Bank, 96 US 268 (1877), and the Georgia decision under 12 USC, § 86, of First National Bank of Blakely v. Davis, 135 Ga 687, 70 SE 246 (1911), which held that "knowingly" means "intentionally and designedly." He then reviewed American Timber & Trading Co. v. First Nat. Bank of Oregon, the instant case, and concluded that the Oregon District Court and the Ninth Circuit Court of Appeals incorrectly applied United States v. International Minerals and Chemical Corp.

> "A critical distinction exists, and was recognized in International Minerals, between statutes or regulations dealing with dangerous items or goods, and those that do not:
>
> * * *

"Neither the district court nor the court of appeals in the American Timber case considered any precedent other than International Minerals. This Court finds that case poor precedent for an area far removed from dangerous items or goods, and prefers to follow the approach taken by the Davis case, which was a National Bank Act case. Thus, Section 86 requires more than mere knowledge of the facts, but rather 'intentionally and designedly' exacting usurious interest. * * *

"Two things become clear from the foregoing discussion. First, that 'knowingly done' in the context of the National Bank Act means something more than merely having knowledge, and second, that the intention of the Bank in making these loans must be examined, as the usurious nature of the transactions is not apparent on the face of the notes. * * *

"The Bank, in opposing plaintiffs' summary judgment motion, relies upon the long-standing practice of all District of Columbia banks in making personal unsecured loans without regard to the declining balance, and also relies upon various statements by Congress, the Comptroller of the Currency, and counsel that the practice was legal. This reliance is obviously relevant for purposes of looking at the intentions of the Bank when entering into contracts not usurious upon their face. The Court overrules plaintiff's motion for summary judgmnet in such a circumstance." (Opinion, Cohen v. District of Columbia Nat. Bank, pp. 15-19)

The lower court decisions in the instant case are an incorrect interpretation of an important statute, for reasons in addition to those mentioned by Judge Gasch in Cohen v. District of Columbia Nat. Bank, supra.

First, the only usury case referred to in the opinion of the Court of Appeals is that of Ditmars v. Camden Trust Co., 10 NJ 471, 92 A2d 12 (1951).

In Ditmars, the New Jersey court held that interest should not be computed on a 360-day basis (which conclusion was immediately changed by the New Jersey Legislature; see New Jersey Rev Statutes, § 31:1-1). In dealing with the question whether the lender could be found to have intentionally violated the usury statute, the trial court in Ditmars expressly found that no intentional violation was present, and that claimant could recover only for breach of contract and not usury. In

Ditmars, as in the instant case, the lender was relying on industry custom. The Ditmars decision is squarely in point on the intent issue presented in this case. The departure by the lower courts in the instant case from the Ditmars ruling, and reliance instead on a case decided under the transporting of corrosive liquids statute, is not supported by precedent or logic.

The Cohen decision, the Ditmars decision from New Jersey, and the Investment Assoc. decision from Oregon are not unique in requiring the showing of a specific intent to violate the law as an element of usury. The cases decided under 12 USC, § 86, make it clear that, for a plaintiff to sustain his burden of proof, it must be shown that the contract was unlawful and that the parties knew that it was. Bank of the United States v. Waggener, 9 Pet 378 (1835).

Not only must there be specific intent to exact excessive interest to constitute usury, but also all the elements of usury, including wrongful intent, must be present at the inception of the transaction. United States Mortgage Company v. Sperry, 138 US 313 (1890). See also, First National Bank of Blakely v. Davis, 135 Ga 687, 70 SE 246, 249 (1911); Moers v. American Exch. Nat. Bank, 203 NYS 727, 728 (1924); Merchants' & Planters' Nat. Bank of Mill Creek v. Horton, 27 Okla 698, 117 P 201, 202 (1911); Hall v. First Nat. Bank of Fairfield, 30 Neb 99, 46 NW 150, 151 (1890); Armstrong v. City Nat. Bank of Galveston, 16 SW2d 954, 958 (Tex Ct App, 1929), cert. denied 281 US 737.

The courts below were in error and have acted contrary to established authorities, as there was no evidence whatever that Bank had the specific intent required to violate the usury law at the time the

contracts to loan at maximum rates were executed. There was no way that Bank could have known that it was violating the law, as the authorities, including case decisions, textwriters, annotators, and even opinions of regulatory agencies were clearly to the effect that Bank was not violating the law by using the 360-day method of computing interest. As Bank did not know and could not have known that it was violating the law, the petition for certiorari should be granted to correct an obvious error.

B. The Court of Appeals Failed to Apply Controlling Federal Law.

Another major issue is whether, in a case brought under 12 USC, § 86, custom and practice as to method of computation of interest should be taken into account. The trial court held that custom and usage could not be considered and, further, that it was "doubtful" that Bank

could show such custom as a factual matter. The Court of Appeals affirmed both rulings.

The decision below is in direct contravention of the applicable decisions of this court. There has been a series of cases under the National Bank Act, and previous law, where this court ruled that federal law controls. Under federal law, applicable custom in computing interest may be shown as a defense to a claim of usury, even though the method of computation results in a slightly higher return.

The landmark case is Evans v. National Bank, 251 US 108 (1919). In Evans, this court was presented with the question whether the National Bank Act adopted the usury laws of the states, or went only so far as to adopt the rate of interest, leaving the method of computation and other matters to federal law. This court, in

Evans, held that state law is adopted only insofar as it fixes the rate of interest (251 US 109-114).

The dissenting opinion of Justice Pitney clearly frames the issue that was decided in the Evans case (251 US 115-120).

In trying to reduce this case to a posture where the major issues could be decided by summary judgment, the lower courts did not attempt to distinguish the decisions of this court. Instead, they chose not to follow them and instead followed a rejected theory in interpreting the federal statute, even though this court has sanctioned numerous long-standing customs as to computation of interest. Fleckner v. Bank of United States, 21 US (8 Wheat) 338 (1823) (discount); Fowler v. Equitable Trust Company, 141 US 384 (1891) (discount); Thornton v. Bank of Washington, 3 Peters (US) 36 (1830) (counting days twice on renewals);

Renner v. Bank of Columbia, 9 Wheat (US) 581 (1824) (inclusion of days of grace in computing interest in advance).

The error committed by the lower courts in the instant case is in not recognizing that, under the decisions of this court, long-standing custom and practice may be taken into account. It does not require an amendment to the statute to reach the result, as the concurring opinion below suggests. In fact, the opposite is true--it would take an amendment to overrule existing law, as set forth in Evans.

Refusal of the lower courts to follow the decisions of this court constitutes error, and the petition for certiorari should be allowed to reverse and correct the error.

C. A Conflict Exists between Courts of Appeal

The decision herein of the Court of Appeals is in conflict with the decisions

of other Courts of Appeal on an important matter of federal law.

Illustrative of the conflict is Northway Lanes v. Hackley Union National Bank and Trust Company, 464 F2d 855 (6 Cir 1972). In the Northway case, the borrower contended that the imposition of closing costs, in addition to interest at the maximum legal rate, was tantamount to usury. The borrower contended that such add-ons were usurious under state law and that, under 12 USC, § 85, national banks were restricted to the charges or rates established by state law for state banks.

The Sixth Circuit, following the precedents of this court, including Tiffany v. National Bank of Missouri, 85 US 409 (1873), and Daggs v. Phoenix National Bank, 177 US 549 (1899), held that the borrowers' contentions were incorrect and that, under the National Bank Act, a national bank had the right to charge any interest rate afforded

state competitors, whether the competitor was a state bank or any other nonbank lender (464 F2d 861-862).

The decision of the Court of Appeals in the instant case is in conflict with the decisions of this court, and with the decisions of other Courts of Appeal. The issue is an important question of federal law, affecting as it does the whole national bank system.

D. The Court of Appeals Erred in Affirming Summary Judgment.

The trial court realized from the outset that the question whether long-standing custom and practice should be taken into account in determining whether there was "usury" was a principal issue in the case.

The trial court also realized that the question was properly one of fact, and the factual issues could not be decided on a motion for summary judgment. The court's remarks paint the picture in clear relief:

> "Well, I would like to get this one question up to the 9th Circuit as soon as possible and that is the question of whether 360-day computation, when done intentionally, violates Section 86 of Title 12." (Tr. of April 27, 1971, p. 67)

> "What I would like to do is decide the question in such a way that the decision will go to the Court of Appeals. If the parties are interested in an appeal, it will go on the merits, and not be sidetracked on some procedural deficiency.

> "It seems to me there are really three kinds of questions involved. One is the statutory construction question. Now, that does not require any agreed or disagreed facts. That is just a question of statutory construction. Thus there is a factual question about the industry, the banking business. Now, the materiality of the significance of these usages is a question of law, but what the usages are is a question of fact. I had thought that the parties could agree on what those facts--on what the usages are. Apparently, there is some disagreement or, at least, disparity of interpretation on the usages of the business." (Tr. of October 29, 1971, p. 15)

The trial court was aware, as the above remarks disclose, that there was present in the case a seriously disputed issue of fact.

Summary judgment cannot be granted where there are disputed factual issues. The

trial court in the instant case was uncertain as to the proper interpretation of the statute, and wanted to send the case to the Court of Appeals on interlocutory appeal to get that interpretation. However, that piecemeal approach was threatened by the presence of major factual issues, first presented on the motions for summary judgment.

The trial court sought to dispose of the issue by rejecting the applicable precedents from this court. The error in that ruling is discussed in the previous sections. Realizing that it might not be possible to simply ignore the applicable decisions of this court, the trial court sought to dispose of the issue by making a finding of fact. Thus, despite the fact that the matter was before the court on a motion for summary judgment and that Bank contended that there was a custom and practice and offered proof thereof, the trial

court made the following factual finding:

> "Whether the practice could attain legitimacy by long usage is doubtful because only in periods of heavy borrowing and high interest would the question ever arise."

The trial court's attempt to decide an issue of fact on summary judgment, or to conclude, prior to hearing any evidence, that Bank would be unable to show the facts that were contended for, is improper under the Federal Rules of Civil Procedure. In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue exists, not to resolve any existing factual issues. Rule 56(c), Federal Rules of Civil Procedure.

On summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, 369 US 654-655 (1962).

Difficult problems of statutory construction should be grappled with after full exploration of the facts at trial and not on the basis of summary judgment. United States v. Perry, 431 F2d 1020, 1022-1023 (9 Cir 1970).

Contrary to the result in this case, the rule of law is that inferences must be drawn in the light most favorable to the party opposing the motion for summary judgment. White Motor Company v. United States, 372 US 253 (1963); Poller v. Columbia Broadcasting System, 368 US 464 (1962); Norfolk Monument Company v. Blank Memorial Park, 394 US 700 (1969).

An unnecessary finding of fact is a tell-tale flag that summary judgment should not have been granted. General Teamsters, Chauffeurs & Helpers Union v. Blue Cab Co., 353 F2d 687 (7 Cir 1965); Trowler v. Phillips, 260 F2d 924 (9 Cir 1958).

In the instant case, the facts as to the custom of computing interest on the basis of a 360-day year were hotly disputed. It was even framed as a contested issue in the document presented to the court. Bank furnished evidence by way of affidavits and answers to interrogatories that such custom did exist. The answers to interrogatories, for example, referred to numerous textbooks describing the method (Bank's answers to interrogatories; Rec. 489-91). There was even included in the record a study by Congressman Wright Patman showing that a substantial percentage of banks surveyed by his committee use the challenged 360-day method of computing interest.

Bank not only made an offer of proof as to the existence and wide acceptance of such custom, but also brought to the attention of the trial court the fact that the custom was so well known, it had been referred to and adopted in a number of case

decisions and approved by all the text-writers and commentaries. Dickey v. Bank of Clarksdale, 183 Miss 748, 184 So 314 (1938); Bradley v. McKee, 5 Cranch CC 298, Fed Cases No. 1784 (1837 DC); Lyon v. State Bank, 1 Stew 442 (Ala 1928); Camp v. Bates, 11 Conn 487 (1836); Patton v. Bank of La Fayette, 124 Ga 965, 53 SE 664 (1906); Planters Bank v. Bass, 2 La Ann 430 (1847); Duvall v. Farmers Bank, 7 Gill & J 44 (Md 1835); Agricultural Bank v. Bissel, 12 Pick 586 (Mass 1833); Planters Bank v. Snodgrass, 4 How 573 (Miss 1840); Cox v. Timlake, 169 Miss 568, 153 So 794 (1934); Mossman v. Schulter, 5 Ohio Dec Reprint 404, 5 ALR 425 (1876); Lafayette Bank v. Findlay, 1 Ohio Dec Reprint 49, 1 West LJ 321 (1844); Pool v. White, 175 Pa 459, 34 Atl 801 (1896); Merchants' and Planters' Bank v. Sarratt, 77 SC 141, 57 SE 621 (1907); State Bank v. Cowan, 8 Leigh 238 (Va 1837); Parker v. Cousins, 2 Gratt 372, 44 Am Dec 388 (Va

1845); Bank of Burlington v. Durkee, 1 Vt 399 (1829).

For texts, see Williston, Contracts, § 1693A (Rev. Ed. 1938); Corbin, Contracts, § 1504A (First Ed. 1962); Restatement, Contracts, § 534(c); Annotation, Computing Interest on Basis of 360 Days in a Year, 30 Days in a Month, or the Like as Usury, 35 ALR2d 842.

In fact, the practice is ancient, and can be traced back to the earliest days of banking in England. Martin Mayer, in his new book, The Bankers, (Weybright and Talley, 1974; pages 40-41), discusses the Italian bankers who established themselves on Lombard Street in London and adopted the practice which still bears the name of the location.

> "In France, a 'Lombard rate' on a short-term loan means that the interest is calculated on the basis of a 360-day rather than a 365-day year. Thus, a borrower for 90 days at 12 percent pays 3 percent rather than 2.96 percent for his loan." (pp. 40-41)

The evidence before the trial court was that the practice is an ancient commercial one, which originally arose because of the difficulties and inconveniences under our calendar of computing interest where all months did not contain an equal number of days. It was easier mathematically for borrower and lender both to compute months as though they all contained 30 days. If repayment was to be made monthly, for example, it could be stated in the instrument that payments would be a given amount each month until the loan was paid.

There was no affirmative evidence before the court from which the court could conclude that "long usage is doubtful because only in periods of heavy borrowing and high interest would the question arise." That conclusion is an inference drawn against Bank, when the law permits only inferences in favor of a party opposing summary judgment. It is also an inference

contradicted by positive fact. Loans are made at maximum rates all the time because of a lender's evaluation of the risk. Not all loans are made at prime rates; in fact, only loans to the best commercial borrowers are made at those rates. In fact, there was s sufficient number of borrowers at maximum rates, wholly apart from variations in the prime rate, that the trial court declared that this case would be allowed to proceed as a class action.

The trial court's improperly drawn inference, then, is contrary to the facts--or at the very least there is a genuine dispute, as the trial court earlier had recognized. It is an inference or finding of fact which not only is improper in light of the facts of this case, but also is incredible in view of the 17 decided cases which reached an opposite result. Under Rule 56, the trial court could not legally

say that it believed that the existence of a state of facts might be "doubtful."

In light of evidence as to the long-standing custom, Bank was entitled to a factual trial and an opportunity to show that the necessary usurious intent to constitute a violation of 12 USC, § 86, did not exist. Cohen v. District of Columbia Nat. Bank (opinion of July 17, 1974, not yet reported, but see Appendix 29a hereto).

> "The Bank, in opposing plaintiffs' summary judgment motion, relies upon the long-standing practice of all District of Columbia banks in making personal unsecured loans without regard to the declining balance, and also relies upon various statements by Congress, the Comptroller of the Currency, and counsel that the practice was legal. This reliance is obviously relevant for purposes of looking at the intentions of the Bank when entering into contracts not usurious upon their face. The Court overrules plaintiffs' motion for summary judgment in such a circumstance." (p. 19)

E. The Court of Appeals Incorrectly Considered the Issues to be Matters of State Law.

This action was brought under a

federal statute, and is controlled by federal law. Evans v. National Bank, 251 US 108 (1919). Nonetheless, the Court of Appeals purported to find that the issues were governed by state law, and deferred to the trial court's interpretation of state law. The error is apparent, for reasons discussed above.

If Bank is incorrect in its reading of Evans v. National Bank, and there is any issue of state law involved, that issue was not correctly decided. In fact, neither of the courts below would come to grips with the matter, each deferring to the other. The Court of Appeals, for example, stated that the trial court had defined state law, and that it would defer to the trial court and not attempt to analyze whether the decision was correct. The trial court, on the other hand, merely made a tentative ruling for the purpose of getting a definitive ruling on interlocutory appeal from the

Court of Appeals. The record is replete with statements by the trial judge that he was uncertain as to the correctness of his decision and that, as far as he could determine, the decision could go either way.

The second major error of the Court of appeals was that, in order for it to be able to apply the rule that a trial judge should be deferred to in interpreting state law, there has to be a definitive ruling at the trial court level. The usual procedure is for the trial court to analyze precedents from other states, and comments of text-writers and Restatement commentaries. Stool v. J. C. Penney Company, 404 F2d 562, 563 (5 Cir 1968); Epling v. United States, 453 F2d 327 (9 Cir 1971) (look to Restatement); Gray v. Travelers Indemnity, 280 F2d 549 (9 Cir 1960); Northway Lanes v. Hackley, 464 F2d 855 (6 Cir 1972). If the trial court had followed that method, it would have come to the opposite conclusion (see

authorities set forth at page 37 of this petition).

F. The Court of Appeals Decided an Important Question of State Law in a Way in Conflict with Applicable State Law.

The loans to the nominal parties plaintiff in the instant case were for sums in excess of $50,000. The Oregon Legislature, commencing in 1971, and again in 1973, passed legislation which first abolished the "defense" of usury for loans of $50,000 or more and then wholly abolished usury for such class of loans. The 1971 Oregon statute (ORS 82.125) read:

> "Notwithstanding any other provision of this chapter, the defense of usury applies only to transactions that involve an amount of $50,000 or less."

The 1973 changes are (ORS 82.010(4)):

> "Except as provided in subsection (5) of this section, the limitations of this section shall not apply to any contract or obligation in an amount in excess of $50,000 and the parties to such contract or obligation may agree in writing to the payment of interest at a rate in excess of those set forth in subsection (1), (2) or (3) of this section."

> "On a loan or use of money involving a principal amount over $50,000, there is no limitation on the interest which banks or national banks may charge." (ORS 708.480)

The effect of the Oregon legislation is to remove pro tanto not only the defense of usury, but also any claim to recover alleged usurious charges of interest. See, e.g., Ewell v. Daggs, 108 US 143 (1883); In re Champion Shoe Machinery Co., 17 F Supp 985 (ED Mo 1937); Moers v. American Exch. Nat. Bank, 203 NYS 727 (App Div 1924); Curtis v. Lovitt, 15 NY 9 (1957); Yaffee v. International Company, Inc., 80 So2d 910 (Fla 1955); Danville v. Pace, 66 Va (25 Gratt) 1, 18 Am Rep 663 (1874).

Where a statute repeals a penalty, the repealing statute is given retroactive application. This is so, even though the statute was enacted after the loan was entered into, or even after action has been brought on a theory of usury, so long as a final judgment has not been entered. The rule

is well summarized in 82 CJS, Statutes, § 439(b):

> "Since there can be no vested right to a penalty before final judgment, as discussed in Constitutional Law § 255, the repeal of a statute imposing a penalty operates to defeat all actions pending for its recovery, whether maintained in the name of the state, or in that of a private individual; and so strictly is this rule enforced that it defeats a pending action, even where the repealing act is passed after verdict or pending an appeal from a judgment of the trial court. (emphasis added)

Oregon law is clearly to the same effect. Drainage District No. 7 v. Bernards, 89 Or 531, 555, 174 P 1167 (1918).

> "The general rule is that the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal."

See also Bichel Optical Laboratories, Inc., v. Marquette National Bank of Minneapolis, 336 F Supp 1368, 1370 (D Minn 1971).

The decisions under 12 USC, § 86, demonstrate that, when a prohibition against usury is removed by the statute of the state

where the action is pending, the action for the penalty is abrogated. Such statutory interpretation is consistent with the general rule as to repealing legislation, and should have been applied in the instant case. The lower courts have rendered a decision in conflict with applicable law, and the petition for certiorari should be granted to reverse such error.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

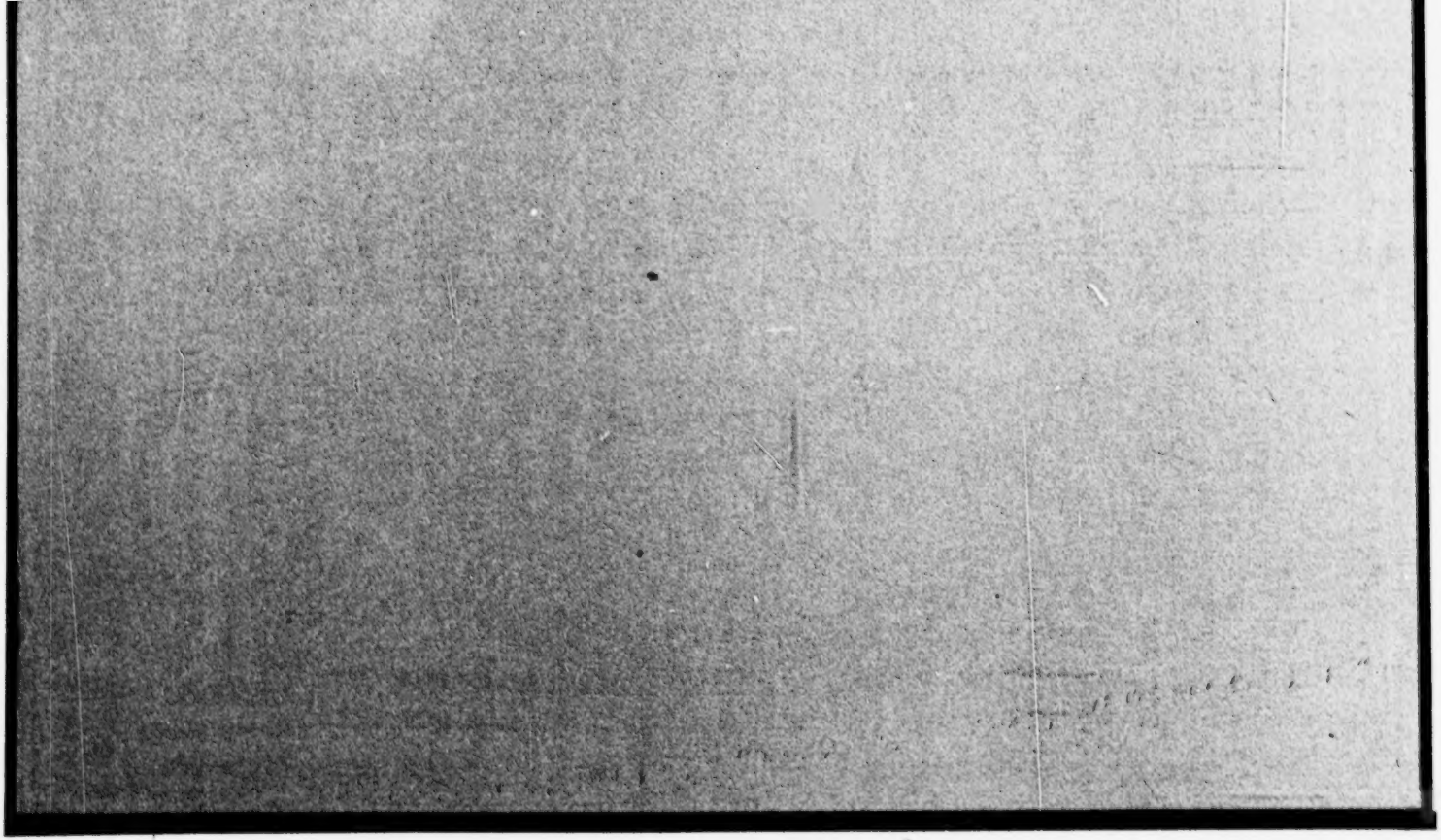
Respectfully submitted,

FREDRIC A YERKE

NORMAN J. WIENER

R. ALAN WIGHT

MILLER, ANDERSON, NASH,
YERKE & WIENER
900 S. W. Fifth Avenue
Portland, Oregon 97204



APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AMERICAN TIMBER & TRADING CO., et al, Plaintiff, v. FIRST NATIONAL BANK OF OREGON, a National Banking Association, Defendant.	)	Civ. No. 70-687
	)	MEMORANDUM OPINION
	)	December 6, 1971
LAWRENCE BERNARD,et al, Intervening Plaintiff, v. FIRST NATIONAL BANK OF OREGON, a National Banking Association, Defendant.	)	

GOODWIN, Judge:

On an agreed statement of facts and cross-motions for summary judgment, the court has for decision a segregated question whether the rates of interest charged certain borrowers by the defendant bank are usurious under 12 U.S.C. 86. The National Banking Act incorporates the maximum-interest law of the state or territory where a national bank does business. 12 U.S.C.§85.

During recent periods of high demand for commercial loans, the defendant charged certain individual and corporate borrowers interest computed respectively at 10% and 12% per annum. These are the statutory limits on the rates an Oregon lender may exact from individual and corporate borrowers. ORS 82.010. The bank computed plaintiffs' interest on the basis of a year of 360 days. During a calendar year, interest computed by the challenged method yields an interest return of 10.139% and 12.167% respectively.

The plaintiff borrowers assert that the bank's method of computation offends 12 U.S.C. § 86:

> "* * * [C]harging a rate of interest greater than is allowed by * * * [Section 85], when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred * * *"

The bank denies that its challenged interest schedules exceed Oregon's lawful rate, and asserts that even if an Oregon court should construe ORS 82.010 as the plaintiffs contend it should be construed, the bank's interest rates still would not be usurious within the meaning of Section 86.

No Oregon decision construing the words per annum in the 360-day context has been found. I do not know how the state courts will translate per annum if ever called upon to do so. But the words mean, in Latin, "by the year." The ordinary person assums that a year, except leap year, has 365 days.

I have concluded that, because the bank's method of computation produces in a single calendar year more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days, the challenged method of computation violates ORS 82.010. See Ditmars v. Camden Trust Co., 10 N.J. 471, 92 A.2d 12, 25 (1952). Whether the practice could attain legitimacy by long usage is doubtful because only in periods of heavy borrowing and high interest would the question ever arise. Thus, it cannot be said that the Legislative Assembly has "acquiesced" in a practical construction of the law at odds with the plain meaning of its words.

In holding that interest on notes for periods of one year or longer may not exceed the maximum rate computed on a year of 365 days, I express no opinion upon the propriety of employing months of thirty days each in computing interest on notes for periods of less than one year.

See Restatement of Contracts § 534(c). The question of fractional years is not before the court.

The legislative intent in enacting usury laws is to protect borrowers from paying excessive interest. Usury legislation is a form of consumer legislation. It should be construed with regard to its net effect upon the borrower rather than upon the bookkeeping burden, customs, or convenience of the lender.

Since I hold that the use of the 360-day year in computing interest at the ceiling, or maximum, legal rate violates local law, the practice automatically violates 12 U.S.C. § 86, unless the court can say the excessive interest was not exacted "knowingly."

The word "knowingly" ordinarily means that the act or omission was intentional. It is not necessary that the actor intended to break the law. It is enough that he intended the act. One may be ignorant of the law, and yet be found to have violated its demands. United States International Min'ls Corp., 402 U.S. 558 (1971).

Here, it is agreed that the bank knew that its computation of interest on the 360-day year would result in borrower paying more in one year than the maximum legal rate when computed on a calendar year. Indeed, the record shows that the bank's computers and interest charts are geared to paying interest to depositors on the basis of a calendar year while charging interest to plaintiffs on the basis of the shorter year with the resulting higher yield. Clearly, then, the bank

understood full well the different financial implications between using the 360-day year in the latter case and the 365-day year in the former.

If a bank chooses to elevate its interest charges to the legal ceiling, then it reduces the length of the year at its peril. If the bank is concerned about the judicial interpretation of the legal ceiling, it can protect itself by charging a rate that will be legal whichever way the courts might interpret the words "per annum."

The plaintiffs are entitled to proceed with the balance of this litigation upon the assumption that the bank has been in violation of 12 U.S.C. § 86 in each set of circumstances covered by the agreed facts.

Because of the importance of the segrated question to the parties and to the banking industry, I will certify the question as one appropriate under 28 U.S.C. 1292(b) for an interlocutory appeal.

Plaintiffs' counsel will proceed forthwith to present an appropriate form of order.

Pending the decision upon the tendered appeal, all class-action proceedings under Rule 23 will be stayed, wihout prejudice by reason of such delay, however, to the rights of any class plaintiff whose claim has not yet been asserted.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN TIMBER & TRADING COMPANY, et al,	)	
Plaintiff-Appellee,	)	No. 72-1066
vs.	)	OPINION
FIRST NATIONAL BANK OF OREGON,	)	November 20, 1973
Defendant-Appellant,	)	
vs.	)	
LAWRENCE BERNARD, et al,	)	
Intervening Plaintiff - Appellee.	)	

CHOY, Circuit Judge:

Plaintiffs American Timber and Trading Co. (AT&T) and Lawrence Bernard and Dr. Lawrence Bernard, P.C. (Bernard) brought this class action claiming that the First National Bank of Oregon (the bank) charged usurious interest rates and thereby violated 12 U.S.C. §§85, 86.

The bank charged individual and corporate borrowers the Oregon statutory limits of interest at the rates of 10% and 12% per annum respectively for a 365 day year (ORS 82.010), but computed such interest on the basis of a 360 day year (365/360 method).[1/] By using this method, the actual interest rates for a calendar year were 10.139% and 12.167% respectively.

In the trial below, the district judge indicated that he wanted to segregate for advance determination the issue whether the 365/360 method was usurious under 12 U.S.C. §86.[2/] Therefore, on stipulated facts the parties filed cross-motions for summary judgment. The court concluded that, because the 365/360 method produces in a single calendar year more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days, it violates ORS 82.010. Moreover, the court ruled that the bank knowingly exacted the excess interest and thereby violated 12 U.S.C. §86. 334 F. Supp. 888 (D. Ore. 1971). The district court certified the issue to this court as appropriate for interlocutory appeal. We affirm.

Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§85, 86 prescribe the rates of interest that may be charged by national banking associations and declare that the receiving of a rate of interest greater than that allowed, when knowingly done, shall be deemed a forfeiture of the entire interest due and in case the greater rate of interest has been paid, the borrower may recover twice the amount of the interest paid. Section 85 provides that a bank may charge interest at the rate allowed by the laws of the state where the bank is located. The National Bank Act "adopts usury laws of the States only in so far as they severally fix the rate of interest." Evans v. National Bank of Savannah, 251 U.S. 108, 111 (1919).

Thus, we must first look to Oregon law to determine if the rate charged in the instant case was excessive. An Oregon lender may exact from individual and corporate borrowers 10% and 12% per annum respectively. ORS 82.010. Unfortunately, there is neither legislative history nor court decisions construing the words per annum in the 360 day context. The district court determined that the Latin words per annum mean "by the year" and that the ordinary person assumes that a year, except leap year, has 365 days; thus, because the bank's method of computation produces in a single calendar year more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days, the challenged method of computation violates ORS 82.010.

We attach great weight to the district court's determination as to the law of the particular state in which it sits, especially where, as here, there has been no clear exposition of the controlling principle by the highest court of Oregon. Insurance Co. of North America v. Thompson, 381 F.2d 677, 681 (9th Cir. 1967). The district court's determination will be accepted on review unless shown to be clearly wrong. Owens v. White, 380 F.2d 310, 315 (9th Cir. 1967). The bank has not convinced us that the decision of the district court (Judge Goodwin, a former Justice of the Oregon Supreme Court) is a clearly incorrect statement of Oregon law.

The bank contends that even if the rate charged is excessive, the loans were not usurious because the loan contracts were at rates permitted by law. Thus,

the money received in excess of the legal rate is not interest, but an overcharge. We see no merit to this contention. Although the literal terms of the loan agreements provided for 10% and 12% interest, it was implicit in the agreement that the bank would calculate interest on its customary basis of a 360 day year. Moreover, Oregon law does not require that a usurious rate be specified in the loan agreement. The exacting of a greater rate of interest is sufficient to constitute usury. ORS 82.120(2), Balfour v. Davis, 14 Or 47, 52, 12 P. 89, 92 (1886).

The bank further contends that it did not intend to violate the law, so it did not knowingly exact excess interest. We disagree. While the bank may not have realized that its method of computation was illegal, it was agreed that the bank knew that its computation of interest on the 360 day year would result in a borrower paying more in one year than at the maximum legal rate when computed on a calendar year. The act of charging the excessive interest was intentional. This is sufficient to constitute a knowing violation of the law. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971).

The bank also challenges the ruling of the district court on the ground that it was precluded from producing any evidence of banking custom. The bank contends that the use of a 365/365 method creates difficult computations and, therefore, for reasons of convenience the banking community considers it proper to use the simpler 365/360 method. The district court noted that the legislative intent in enacting usury laws is to protect

borrowers from paying excessive interest. The court felt the act should be construed with regard to its net effect upon the borrower rather than upon the bookkeeping burden, custom, or convenience of the lender. The court noted that the bank used the 365/365 method to compute interest it paid to its depositors. Moreover, the court doubted whether the practice could obtain legitimacy by long usage because only in periods of high interest and heavy borrowing would the question ever arise. Therefore, it concluded that it could not be said that the Legislative Assembly has acquiesced in a practical construction of the law at odds with the plain meaning of its words. Again, we agree with the district court's ruling.

In September, 1971 the Oregon legislature enacted a provision which limits the defense of usury to transactions involving less than $50,000. ORS 82.125. It is undisputed that the nominal plaintiffs in this case had loans in excess of $50,000, although these laons were contracted prior to September, 1971. The bank, however, contends that the new Oregon legislation removes not only the defense of usury, but also any claim to recover usurious interest. We disagree with the bank's construction of this legislation. Plaintiffs' law suit commenced almost a year before ORS 82.125 became effective. Absent a clear, express intention, legislation in Oregon is not normally applied retroactively. Seton v. Hoyt, 34 Or. 266 55 P.967 (1899); Smith v. Clackamas County, 252 Or. 230, 448 P.2d 512 (1968). Nothing in either the language of the statute or the legislative history indicated a desire to eliminate causes of action that had

already accrued prior to the passage of the act. Again, we see no basis for a reversal.

Finally, the bank contends that we should give our ruling only prospective effect. We have given this issue serious consideration, and have decided that it would be inadvisable to give this decision only prospective effect. First, we cannot deny plaintiffs the fruits of successful litigation. Simpson v. Union Oil Co. of California, 396 U.S. 13 (1969). Second, we do not think that the ruling in the instant case qualifies for prospective application under the three-prong test established by the Supreme Court in Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-7 (1971). Our decision is not overruling clear past judicial precedent on which the bank may have relied. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 496 (1968). The Bank contends that it relied upon industry custom. As we said earlier, we doubt the existence of such custom,[3/] but even if it were industry practice, it is highly unlikely that this would be sufficient to justify nonretroactive application. Any claim by the banking industry that ease of calculation is justification for exacting higher interest is of dubious validity in this age of computer technology. We think nonretroactive application would retard the operation of the rule announced today. Linkletter v. Walker, 381 U.S. 618, 629 (1965). We also doubt that this decision will create great hardships as the bank suggests. Our decision is limited to a construction of Oregon law. Oregon limits the usury defense to loans of less than $50,000 (if made after September, 1971).

The National Bank Act contains a short two-year statute of limitations. Undoubtedly a significant number of borrowers will take advantage of this decision, but the disastrous consequences suggested by the amicus curiae, American Bankers Association, are greatly exaggerated. Therefore, the decision in this case does not justify any special treatment such as prospective application.

Affirmed and remanded for further proceedings consistent with this opinion.

FOOTNOTES

1. [reference on page 6a]

There are three different methods used in calculating interest. They are as follows:

365/365: Under this method the rate of interest is divided by 365 and this produces a daily interest factor. The number of days that the loan is outstanding is then multiplied by this daily interest factor. Under this method a different amount of interest is charged for months of different lengths.

360/360: Under this method each month is treated as having the same number of days (30). Thus, interest for each month is the same. However, for a calendar year the interest is exactly the same as that calculated by using the 365/365 method.

365/360: The third method (the one used in this case) is a combination of the first two methods. The interest rate

is divided by 360 days (30 days for each month) to create a daily factor. The number of days that a loan is outstanding is then multiplied by this daily factor. Thus interest charged for months of different lengths is different and interest charged for a calendar year is greater than interest charged under either the 365/365 or 360/360 methods.

2. [reference on page 7a]

Although the district court ruled that the case should proceed as a class action, the court held this aspect of the case in abeyance pending the resolution of the substantive issues. On appeal both parties raise questions relating to the class action aspects of the case. This issue was not certified and therefore we do not consider it.

3. [reference on page 11a]

Nationwide surveys indicate that although the 365/360 method is used there is no definite, uniform, long-established custom. The results of a Federal Reserve Board survey were summarized by Congressman Patman as follows:

> This practice [use of the 365/360 method) is not standard or uniform in any way. It varies among banks with respect to the types of loans or maturities of loans subjected to the practice. It varies even in many instances within the same bank with respect to the type of loans and maturity of loans to which the practice is applied and it varies significantly from one part of the

country to another. 117 CONG REC 18539 (1971) (Remarks of Congressman Patman).

CHAMBERS, Circuit Judge, concurring:

I concur in the foregoing opinion on the basis of precedent. Certainly what the bank was doing was not venal. This is not a case of loan sharking. I think the situation cries out for an amendment to the federal statutes to permit what was done here, i.e., 360/365 (sic).

Also, I think this is a case where our class action rules present a monstrosity. I was a lawyer once, and I am sure that most of the members of the class have never met the attorneys for plaintiffs. If outset solicitation of the business were proper, I am sure most of the "class" would have said, "No thank you."

As I understand it, the district court has not yet fully defined the class and has not specifically ruled on the "small loans" question.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN TIMBER & TRADING COMPANY, et al, Plaintiffs-Respondents,	No. 72-1066
vs.	ORDER GRANTING PETITION FOR REHEARING
FIRST NATIONAL BANK OF OREGON, Defendant-Appellant,	April 10, 1974
vs.	
LAWRENCE BERNARD, et al, Intervening Plaintiff-Appellee.	

The petition for rehearing is granted. The court is of the opinion that we should wait a reasonable time to see if the issues are resolved in the Oregon state courts.

The petition for rehearing will be deemed submitted for decision six months after the date of filing of this order.

The filing of further briefs and papers will be permitted or required only on further order of the court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN TIMBER & TRADING COMPANY, et al, Plaintiff, vs. FIRST NATIONAL BANK OF OREGON, A National Banking Association, Defendant.	)	No. 72-1066
	)	ORDER
	)	December 2, 1974
LAWRENCE BERNARD, et al, Intervening Plaintiff, vs. FIRST NATIONAL BANK OF OREGON, a National Banking Association, Defendant.	)	

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. F. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The stay of further proceedings in this court is vacated; the mandate shall issue.

12 USC, § 85

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a

bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 USC, § 86

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

ORS 82.010

(1) *The legal rate of interest is* six percent per annum and is payable on:

(a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.

(b) Judgments and decrees for the payment of money from the date of the entry thereof unless some other date is specified therein, except that those upon contracts bearing more than six percent interest and not exceeding the maximum rate, bear the same rate of interest as borne by such contracts.

(c) Money received to the use of another and retained beyond a reasonable time without the owner's express or implied consent.

(d) Money due upon the settlement of matured accounts from the day the balance is ascertained.

(e) Money due or to become due where there is a contract to pay interest and no rate specified.

(2) But on contracts interest up to a maximum rate of 10 percent per annum may be charged upon express agreement of the parties.

(3) Except as provided by subsection (5) of this section, the limitations of this section shall not apply to any contract or obligation for which a domestic or foreign corporation is the obligor, and any domestic or foreign corporation by agreement in writing and not

otherwise may agree to pay any rate of interest not exceeding 12 percent per annum on such contract or obligation as the corporation may determine. The defense or claim of usury by a corporation, or anyone acting in its behalf, in any action or proceeding arising out of a contract or obligation that meets the requirements of this subsection is prohibited.

(4) Except as provided in subsection (5) of this section, the limitations of this section shall not apply to any contract or obligation in an amount in excess of $50,000, and the parties to such contract or obligation may agree in writing to the payment of interest at a rate in excess of those set forth in subsection (1), (2) or (3) of this section.

(5) Subsections (3) and (4) of this section do not apply to any charitable, religious or other nonprofit corporation and any such nonprofit corporation is not prohibited from interposing or pleading the defense of usury in any action or proceeding.

ORS 708.480

Notwithstanding ORS chapter 82, a bank or national bank may contract for and receive for a loan or use of money involving a principal amount of less than $50,000:

(1) On any loan or use of money payable in instalments:

(a) Interest at a rate not exceeding 10 percent per annum or 12 percent per annum if the borrower is a corporation; or on that part of the original principal amount of the loan:

(A) Not exceeding $500, a charge at a rate not exceeding $8 per $100 per annum, or 15 1/2 percent per annum of the declining principal balance, at the lender's option.

(B) In excess of $500 but not exceeding $1,000, a charge at a rate not exceeding $6 per $100 per annum, or 11 1/2 percent per annum of the declining principal balance, at the lender's option.

(b) If the loan is repaid before maturity except as provided in subsection (6) of this section the unearned portion of the charges, if any, shall be refunded to the borrower. If the loan is payable in substantially equal instalments, the amount of the refund shall not be less than the amount computed according to the "rule of seventy-eighths" as set forth in ORS 83.130.

(2) On any loan or use of money through the use of a credit card or other open-end credit arrangement:

(a) A charge for each billing cycle determined by applying a periodic rate computed in accordance with subsection (4) of this section to the indebtedness owing under the terms of the credit arrangement.

(b) In addition to other charges authorized by this subsection, a nonrefundable charge equal to a monthly periodic rate charge computed in accordance with subsection (4) of this section on the initial amount of advances of cash or credit, other than for purchases of goods or services.

(3) Any instalment of an instalment loan or payment under an open-end credit arrangement not paid at maturity shall continue to bear interest and may bear a charge of five percent of the amount of the instalment or payment, or $5, whichever is less.

(4) When a periodic rate is applied to compute the charge under subsection (1) or (2) of this section, the periodic rate shall not exceed a rate computed by dividing the applicable per annum rate in paragraph (a) of subsection (1) of this section by the number of the periods in a year, but in no case shall the applicable rate exceed 15 percent per annum.

(5) On any loan or use of money not payable in instalments and not pursuant to a credit card or other open-end credit arrangement, interest at a rate not exceeding 10 percent per annum or, if the

borrower is a corporation, 12 percent per annum.

(6) On any loan, other than pursuant to an open-end credit arrangement, and not in renewal or extension of a prior loan, on which interest to maturity does not exceed $7.50, a charge not exceeding $7.50 in lieu of interest to maturity. The payment of any loan before maturity does not entitle the borrower to a refund or adjustment by which interest or charges are reduced to less than $7.50.

(7) On a loan or use of money involving a principal amount over $50,000, there is no limitation on the interest which banks or national banks may charge.

Rule 56, Federal Rules of Civil Procedure

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the

hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID COHEN, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	
	)	No. 2110-69
DISTRICT OF COLUMBIA	)	
NATIONAL BANK,ET AL.,	)	July 17, 1974
	)	
Defendants.	)	

OPINION

(Portion of opinion regarding National Bank Act)

II. Application of the National Bank Act.

Plaintiffs also seek a determination from this Court that the Bank's action in making usurious loans falls within the purview of the National Bank Act. 12 U.S.C. § 86 provides:

> § 86. Usurious interest; penalty for taking; limitations.
>
> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the

> person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. (Emphasis added).20/

The key phrase here is "when knowingly done." Plaintiffs seek to cast this term in the general character of having knowledge of the consequences, while the Bank views it as meaning something akin to "corrupt intent." Case law on this point is again not extensive, but a review of those cases which have interpreted the phrase, "when knowlingly done" is helpful.

The Only Supreme Court case that addresses the issue fails to yield meaningful guidance. In Wheeler v. National Bank, 96 U.S. 268 (1877), the Court considered the meaning of Section 30 of the National Currency Act of 1864, the forerunner of 12 U.S.C. § 86.21/ The suit was originally brought by the Union National Bank of Pittsburgh against the endorser of two bills of exchange, to which the endorser interposed the defense of usury. The Court found the bills to be bona fide, thus bringing them under another provision of Section 30 which permitted the bank to profit by the current rate of exchange (when selling at a place other than that of purchase) in addition to taking the lawful rate of interest, without thereby

creating a usurious contract. The Court found that there was no evidence in the record on the question of whether the rate of exchange charged by the bank exceeded the then current rate for sight drafts. As a result, the Court never came to grips with the question of whether the bank knowingly took excess interest, as the notes themselves were concededly valid.

In First National Bank v. Davis, 70 S.E. 246 (Ga. 1911) the Supreme Court of Georgia considered the meaning of the word "knowingly":

> The primary meaning of the word knowlingly is "with knowledge." Webster's International Dictionary. In determining whether usury has been knowingly received, the same principles are to be applied as where the question is whether usury has been contracted for. To constitute usury, it is essential that at the time of the execution of the contract there be an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law. Bellerby v. Goodwyn, 112 Ga. 306, 37 S. E. 376.
>
> * * * * *
>
> The word "knowingly," as used in this section of the national banking act, has been interpreted to mean intentionally and designedly, and an allegation in pleading that a contract for the usurious interest

> was knowingly made is equivalent to charging that it was corruptly made. Wiley v. Starbuck, 44 Ind. 308.22/

The court there was faced with a debt, based on certain notes, which had been extinguished by the transfer of real property to the bank. The court found that where the land transferred had a true market value in excess of the debt plus lawful interest, and where the bank had accepted the transfer as "payment, not only of the lawful debt, but also of the illegal interest, then the [bank] will be deemed to have knowingly accepted payment of the illegal interest . . . ."23/

Recently, two federal courts have dealt with this question. In American Timber & Trading Co. v. First National Bank of Oregon, 334 F. Supp. 888 (D. Ore. 1971), the court found that the use by defendant bank of a 360-day year for computation of loans made at the maximum rate of interest was usurious because the actual interest charged was for a calendar year. Thus, loans at 10 percent and 12 percent per annum yielded actual annual returns of 10.139 percent and 12.167 percent respectively. On the question of whether the bank had violated 12 U.S.C. § 86, the court said that "[i]t is not necessary that the actor intended to break the law. . . . The bank understood full well the different financial implications between using the 360-day year . . . and the 365-day year . . . "24/

The case went to the Ninth Circuit on an interlocutory appeal. In a brief

decision issued November 20, 1973, that court affirmed the finding of the district court, saying:

> While the bank may not have realized that its method of computation was illegal, it was agreed that the bank knew that its computation of interest on the 360 day year would result in a borrower paying more in one year than at the maximum legal rate when computed on a calendar year. The act of charging the excessive interest was intentional. This is sufficient to constitute a knowing violation of the law. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971).25/

The Ninth Circuit has recently granted a petition for rehearing, stating in part that the court will "wait a reasorable time to see if the issues are resolved in the Oregon state courts."26/

In holding the bank accountable under Section 86, the court of appeals cited only the International Minerals case. That case involved a violation of regulations drawn pursuant to 18 U.S.C. § 834, which requires shipping papers for corrosive liquids to reflect the classification of the material shipped. Section 834(f) provides criminal penalties for anyone who "knowingly violates any such regulation." The Court held the statute to be no exception to the general rule that ignorance of the law is no excuse, and that "knowingly" means having knowledge of the facts.

A critical distinction exists, and was recognized in International Minerals, between statutes or regulations dealing with dangerous items or goods, and those that do not:

> In Balint [United States v. Balint, 258 U.S. 250 (1922)] the Court was dealing with drugs, in Freed [United States v. Freed, 401 U.S. 601 (1971)] with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in Murdock [United States v. Murdock, 290 U.S. 389 (1933)], "mens rea" as to each ingredient of the offense.27/

Neither the district court nor the court of appeals in the American Timber case considered any precedent other than International Minerals. This Court finds that case poor precedent for an area far removed from dangerous items or goods, and prefers to follow the approach taken by the Davis case, which was a National Bank Act case. Thus, Section 86 requires more than mere knowledge of the facts, but rather "intentionally and designedly" exacting usurious interest.28/

Plaintiffs make a second argument in an attempt to bring this case within the purview of United States Bank v. Waggener, 34 U.S. (9 Pet.) 378 (1835). That case involved a loan by a United States bank to respondents, paid in the currency of

the Bank of Kentucky, which currency was severely depressed due to that bank's suspension of specie payments. The Bank of the United States later sued on respondents' note, and usury was raised as a defense. The Supreme Court, in finding that the lending of depreciated currency was not a basis for usury, said that

> it may be proper to remark, that in construing the usury laws, the uniform construction in England has been (and it is equally applicable here), that to constitute usury, within the prohibitions of the law, there must be an intention to contract for or to take usurious interest; for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract, upon its very face, imports usury, as by an expressed reservation of more than legal interest, there is no room for presumption, for the intent is apparent; res ipsa loquitur. But where the contract on its face is for legal interest only, there it must be proved, that there was some corrupt agreement or device or shift, to cover usury; and that it was in the full contemplation of the parties.29/

This proposition is still sound law. In Armstrong v. City National Bank, 16 S.W. 2d 954 (Tex. 1929), the court remarked that "[u]nless the contract charged to be usurious shows upon its face that a greater rate of interest than is allowed

by law is being charged for the use of money loaned, the intention of the parties to the contract becomes controlling."30/ As one commentator has stated:

> When a contract is honest on its face, proof of the existence of a corrupt intention to evade the usury law is important, as showing that the transaction is really a cloak to disguise usurious dealing 31/

It is plaintiff's contention that the loans involved in this case were usurious upon their face, and therefore under Waggener, that "there is no room for presumption, for the intent is apparent":

> Given that defendant and the borrowers knew the amounts of money actually delivered to the borrowers, the amount of interest exacted by defendant is plainly evident on the face of each contract.32/

There is a glaring flaw to this argument. A careful examination of the notes involved in this case reveal that the usurious nature of the transaction was not apparent upon the face of the contract. A copy of the note signed by Susan Davis July 2, 1969, shows that only the total amount to be repaid, $652.08, was recited. No rate of interest appears. The monthly installments, $54.34 each, are identified, and the term of the loan is noted by virtue of the fact that there were to be 12 monthly repayments. Clearly, one of two things would have to be included for the loan to be usurious by

the face terms: either the amount actually tendered (in this case, $600) or a recitation of the true interest rate itself.

Plaintiffs argue further that Armstrong and Davis do not apply here because "[i]t is only necessary to look for a corrupt intent where the contract on its face is expressly for only the legal rate of interest."[33/] This is simply not the case. The rule of Waggener has been more broadly interpreted than plaintiffs assert, as Armstrong indicates.

Two things become clear from the foregoing discussion. First, that "knowingly done" in the context of the National Bank Act means something more than merely having knowledge, and second, that the intention of the Bank in making these loans must be examined, as the usurious nature of the transactions is not apparent on the face of the notes.

The Bank has previously submitted, in support of its motion for summary judgment of October 20, 1973, a statement of material facts, accompanied by several supporting affidavits, all of which discuss at great length the long-standing practice of District of Columbia banks in ignoring the declining balance of principal when making personal unsecured loans. Plaintiffs sought to controvert these statements in many respects, but the Court was able to grant partial summary judgment in plaintiffs' favor taking the defendant's statement as completely true. For purposes of this motion, however, the Court cannot do the same, because the statement of material facts and the affidavits indicate that the Bank did not have

the intent this Court feels is necessary to be subjected to the penalties of Section 86. To grant the Bank summary judgment on this point, however, would deny plaintiffs an opportunity to effectively controvert the Bank's statement at trial and show that the necessary usurious intent did exist.[34]

The Bank, in opposing plaintiffs' summary judgment motion, relies upon the long-standing practice of all District of Columbia banks in making personal unsecured loans without regard to the declining balance, and also relies upon various statements by Congress, the Comptroller of the Currency, and counsel that the practice was legal. This reliance is obviously relevant for purposes of looking at the intentions of the Bank when entering into contracts not usurious upon their face. The Court overrules plaintiffs' motion for summary judgment in such a circumstance.

FOOTNOTES

20. [reference on page 30a]

This provision was originally enacted as part of the National Currency Act of 1864, 13 Stat. 99. Section 30 of that Act provided in part that

> the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has

> agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

13 Stat. 108. Previously, the penalty had been forfeiture of the entire loan or debt.

21. [reference on page 30a]

See note 20, supra.

22. [reference on page 32a]

70 S.E. at 249.

23. [reference on page 32a]

Id. The court disallowed recovery because the transfer was by the wife in payment of her husband's debts, and the "statute does not apply to one who pays the debt of another . . . ." Id.

24. [reference on page 32a]

334 F. Supp. at 890.

25. [reference on page 33a]

No. 72-1066, slip op. at 4 (9th Cir. November 20, 1973).

26. [reference on page 33a]

No. 72-1066 (9th Cir. April 10, 1974). Plaintiffs contend that this will not disturb the precedential value of the holding that the bank had violated 12 U.S.C. § 86. For the reasons stated in the text, the Court feels, even granting its precedential value, that the American Timber decision is not persuasive.

27. [reference on page 34a]

403 U.S. at 564-65. Murdock involved a criminal prosecution under the Revenue Act of 1926 for failure to give testimony and to supply information as to certain deductions claimed on federal income tax returns. The statute provided criminal penalties for anyone who "willfully" failed to comply with the Revenue Act provisions. The Supreme Court held that "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct." 290 U.S. at 396.

28. [reference on page 34a]

The Court is mindful of the fact that Section 86 has been held to be penal in nature. Lake Benton First Nat'l Bank v. Watt, 184 U.S. 151, 154 (1902). However, the penalty is not, as in International Minerals, fines and/or imprisonment. The difference between a statute penal in nature and a criminal statute is vast indeed.

29. [reference on page 35a]

34 U.S. (9 Pet.) at 399.

30. [reference on page 36a]

16 S.W. 2d at 958. See also Cockle v. Flack, 93 U.S. 344 (1867).

31. [reference on page 36a]

91 C.J.S. Usuary § 14(b).

32. [reference on page 36a]

Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed April 22, 1974, at 6.

33. [reference on page 37a]

Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, filed June 17, 1974, at 10, n.6.

34. [reference on page 38a]

The Court does have the power to grant summary judgment for a party opposing the summary judgment motion of another party. See, e.g., Kent v. United States, 228 F. Supp. 929 (S.D.N.Y. 1964); United States v. Manufacturers National Bank, 198 F. Supp. 157 (N.D.N.Y. 1961); Bell v. Waterfront Comm'n, 183 F Supp. 175 (S.D.N.Y.), aff'd 279 F.2d 853 (2d Cir. 1960); United States v. Cless, 150 F. Supp. 687 (M.D. Pa. 1957), aff'd 254 F.2d 590 (3rd Cir. 1958); 6 Moore's Federal Practice ¶56.12.

The circumstances in which this is possible are by necessity narrow, normally limited to cases where no material facts are in dispute. Because the Court deems the facts stated by the Bank in its statement in support of motion for summary judgment of October 20, 1973, material, and because the plaintiffs have in the past controverted a number of those facts, this is not one of those rare situations.